

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DALE R. MITCHELL,

Plaintiff,

VS.

JEFF CARLSEN, LAWRENCE PORTER,
KARLAN POWELL, CHRIS
RUNDLETT, JEFF WARD, and
BRENDA DESHAZER.

Defendants.

NO. CV-03-492-JLQ

**MEMORANDUM OPINION
AND ORDER DENYING IN PART
AND GRANTING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

BEFORE THE COURT is Defendants' Motion for Summary Judgment (Ct. Rec.

15). **Dale Mitchell** is appearing *pro se* in this matter. Assistant Attorney General **Aileen Miller** represents the Defendants. Plaintiff alleges that Defendants retaliated against him for actions he was pursuing in the Washington state legal system by confiscating and destroying some of his legal documents and religious materials. Plaintiff alleges that in so doing his First Amendment rights to petition for grievances and to the free exercise of religion were violated. Defendants respond that Plaintiff has provided no more than conclusory allegations of retaliatory motive and that Plaintiff has not provided admissible evidence that he was prohibited from engaging in conduct mandated by his faith.

BACKGROUND

As Defendants are the party moving for summary judgment dismissal of Plaintiff's claims, the evidence and inferences therefrom are viewed in the light most favorable to Plaintiff.

This is a 42 U.S.C. § 1983 action in which Plaintiff, a member of the Islamic

1 faith¹, asserts that his First Amendment rights to access the court to address his legal
 2 claims and to freely exercise his religion were violated while he was incarcerated at the
 3 Airway Heights Correctional Center. Plaintiff claims that he was pursuing legal action
 4 against prison officials in Washington state court in 2001 and 2002. (Ct. Rec. 5, ¶ 4.7-
 5 4.8). Plaintiff was deposed by the Washington State Attorney General's office on
 6 February 14, 2003, as part of his state court litigation. (Ct. Rec. 21-2, p. 4). Plaintiff's
 7 state lawsuit was dismissed on summary judgment in July, 2003. (Ct. Rec. 21-2, p. 25).
 8 Plaintiff complains of cell searches in October, 2001; February, 2003; August, 2003;
 9 and December, 2003, in which property was confiscated and destroyed.

10 The October 2001 search was conducted by Defendant Powell and correctional
 11 officer Martha Hayes. (Deft. St. Fact ¶ 13). A legal document (or documents) was
 12 confiscated. Defendants claim this legal material belonged to another inmate, in
 13 violation of DOC policy. (Deft. St. Fact ¶ 13-14). Plaintiff claims his legal documents
 14 were removed from his legal materials box and were never located or returned. (Dec.
 15 Mitchell ¶ 7-9). Plaintiff filed a prison administrative grievance against Defendant
 16 Powell claiming that she confiscated his legal documents.

17 The February 20, 2003 cell search was conducted by Defendants Rundlett and
 18 Porter. (Deft. St. Facts ¶ 89). Among the items seized as contraband were two copies of
 19 the Quran, Final Call religious newspapers, and a book entitled Message to the Black
 20 Man. (Deft. St. Facts ¶ 91-98). Defendant claims the Qurans were seized because one
 21 had a hand-made cover on it and the other had a ripped cover. Self-made covers are not
 22 allowed under DOC policy to prevent the concealing of contraband or ownership. (Id. at
 23 ¶ 94-95). A book with a ripped cover is considered "altered" under DOC policy and
 24 inmates are not allowed to possess altered items. (Id.). The Quran with the self-made
 25 cover was returned to Plaintiff after the cover was removed. (Id.). The other Quran was

26
 27 ¹At his deposition and in religious preference forms,
 28 Plaintiff indicated his primary religion was Islam. However, he
 apparently also read the Bible and was a member of the Universal
 Life Church.

1 destroyed. (Id. at ¶ 111). Plaintiff disputes that the Quran had a ripped cover. (Mitchell
2 dec. ¶ 59). Plaintiff also disputes that he ever authorized the destruction of the property
3 through the DOC's property disposition process. (Id. at ¶ 30).

4 The Final Call newspapers were confiscated because they were over one week
5 old - - in violation of DOC policy. (Deft. St. Facts ¶ 93). Plaintiff in his deposition
6 effectively admitted that the Final Call newspapers were over one week old in the
7 following exchange:

8 Q. What were the dates of those [Final Call] periodicals?

9 A. I cannot recall . . . I had a subscription to them and I had just been getting
10 them as they come, you know.

11 Q. How often do they come?

12 A. They are periodicals, they come once a month.

13 Q. And, so, if you had more than one, you had several months worth?

14 A. Yes, that's exactly right.

15 Q. How many were taken?

16 A. Approximately 18 of them.

17 Q. So that would be about a year and a half worth?

18 A. Exactly. (Depo. of Plaintiff, p. 117).

19 The book "Message to the Black Man", which is an Islamic text authored by
20 Elijah Muhammad (Ct. Rec. 17, p. 489) was confiscated because the inmate's name and
21 DOC number inside the front cover were blacked out and Plaintiff could not provide
22 proof of ownership. (Deft. St. Fact ¶ 98). Plaintiff claims this book was a "marked legal
23 exhibit for a pending lawsuit". (Plft St. Fact. ¶ 98). Plaintiff cites to his own declaration
24 to dispute Defendants allegation that the book did not contain a name and DOC number
25 as required by DOC policy. However, the declaration does not specifically refute
26 Defendant's claim. Rather, the declaration states "my name and number was on all my
27 property". (Mitchell dec. ¶ 59).

28 Plaintiff was infracted for possession of some of the property seized on February

1 20, 2003. A hearing was held on the general infraction on February 25, 2003, at which
2 Defendant Carlsen found Plaintiff guilty. (Deft. St. Fact ¶ 108-109). Defendant Carlsen
3 claims he asked Plaintiff how he wanted the seized property to be disposed of and
4 offered to allow him to ship the property out at Plaintiff's expense. (Id. at ¶ 110).
5 Carlsen claims Plaintiff refused to have the property shipped out and instead requested
6 it be thrown away. (Id.). Plaintiff did not sign the property disposition form. (Ct. Rec.
7 21-2, p. 21). Plaintiff disputes that he authorized the destruction of his property. He
8 claims that he never requested that his property be destroyed and that he requested that
9 it be returned to him or stored until trial. (Mitchell dec. ¶ 30). Plaintiff filed a
10 Washington state tort claim relating to the February 20, 2003 search.

11 The August 2003 cell search was conducted by Defendant Powell and Officer
12 Laurie Ramseyer. (Deft. St. Fact ¶ 34). Legal documents were again confiscated.
13 Plaintiff claims Powell took the documents (Mitchell dec. ¶ 35) and Defendants claim
14 Officer Ramseyer confiscated the documents. (Deft. St. Fact ¶ 36). These documents
15 were taken because they belonged to other inmates. (Id. ¶ 35, 40-41). Plaintiff was
16 infraeted and pled guilty, admitting that the documents belonged to others and probably
17 should not have been taken to his cell. (Id. at ¶ 41).

18 The December 15, 2003 cell search was conducted by Defendants Powell and
19 Ward. (Deft. St. Facts ¶ 51). During this cell search, a Bible was confiscated. (Id. ¶ 59).
20 Defendants allege the Bible contained a blacked out area where the inmate's name and
21 DOC number should have been and was thus in violation of DOC policy. (Id. ¶ 63).
22 Plaintiff contends that the Bible was his property and that all his property had his name
23 and DOC number on it. (Mitchell dec. ¶ 47, 59). Other inmates who used Plaintiff's
24 Bible during group study attest that they did not see marks on it and it was not altered.
25 (Ct. Rec. 26 & 27). Plaintiff alleges that his Bible was destroyed in front of him and
26 Defendant Ward "appeared to take pleasure in watching my reaction to his trashing of
27 my bible". (Mitchell dec. ¶ 47).

28 In response to the February and December 2003 cell searches and confiscation of

1 property, Plaintiff filed Washington state tort claims. (Ct. Rec. 21-2, p. 12 & p. 32). In
 2 January, 2004, Defendant DeShazer filed an "initial serious infraction report" against
 3 Plaintiff after he filed the second tort claim. (Ct. Rec. 21-3, p. 6). The report alleged
 4 that Plaintiff was trying to obtain money from the state under false pretense. The basis
 5 of DeShazer's belief was that the second tort claim applied to some of the same property
 6 as the first tort claim. (Deft. St. Fact ¶ 116). Plaintiff was found guilty of the infraction
 7 on January 27, 2004. (Ct. Rec. 21-3, p. 7). Plaintiff then wrote a letter of appeal to
 8 Superintendent Maggie Miller-Stout and she had the infraction expunged from
 9 Plaintiff's record. (Ct. Rec. 21-3, p. 9 & Deft. St. Fact ¶ 118).

10 Plaintiff filed his Complaint in this court on December 26, 2003 and then filed a
 11 First Amended Complaint on May 5, 2004 (Ct. Rec. 5) which includes the allegations
 12 against Defendant DeShazer for conduct that occurred in 2004.

SUMMARY JUDGMENT STANDARD

14 The purpose of summary judgment is to avoid unnecessary trials when there is no
 15 dispute as to the material facts before the court. *Northwest Motorcycle Ass'n v. U.S.*
 16 *Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled
 17 to summary judgment when, viewing the evidence and the inferences arising therefrom
 18 in the light most favorable to the nonmoving party, there are no genuine issues of
 19 material fact in dispute. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
 20 242, 252 (1986). While the moving party does not have to disprove matters on which
 21 the opponent will bear the burden of proof at trial, they nonetheless bear the burden of
 22 producing evidence that negates an essential element of the opposing party's claim and
 23 the ultimate burden of persuading the court that no genuine issue of material fact exists.
 24 *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102 (9th Cir.
 25 2000).

26 Once the moving party has carried its burden, the opponent must do more than
 27 simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec.*
 28 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1975). Rather, the opposing party

1 must come forward with specific facts showing that there is a genuine issue for trial. *Id.*

2 **DISCUSSION**

3 The first step in any action under 42 U.S.C. § 1983 is to identify the
4 constitutional right allegedly violated. *Graham v. Conner*, 490 U.S. 386, 394 (1989). A
5 prerequisite to recovery under the Civil Rights Act is that plaintiff establish deprivation
6 of a right secured by the Constitution and laws of the United States. *Gomez v. Whitney*,
7 757 F.2d 1005 (9th Cir. 1985). Plaintiff alleges that the cell search and confiscation of
8 certain items of property were retaliation in violation of his First Amendment right to
9 bring a legal action for his grievances. Plaintiff additionally alleges that his First
10 Amendment right to the free exercise of religion was infringed when Defendants
11 confiscated certain items of property that were religious in nature.

12 **I. The Retaliation Claims**

13 It is well established that a prisoner may assert a cause of action against prison
14 officials who retaliate against an inmate in response to the exercise of a constitutional
15 right. *Rizzo v. Dawson*, 778 F.2d 527 (9th Cir. 1985). To state a claim for retaliation,
16 Plaintiff must establish: 1) that the activity he engaged in was constitutionally
17 protected; 2) that the retaliation occurred because of, and infringed upon, his
18 constitutionally protected activity; and that 3) the retaliatory actions were not
19 reasonably related to legitimate penological interests. *Id.* at 531-32.

20 Participating in litigation and seeking legal redress are First Amendment
21 protected activities. *Id.* at 531; see also *United Transportation Union v. Michigan Bar*,
22 401 U.S. 576, 585 (1971). Filing a grievance with prison officials is a First Amendment
23 protected activity. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1138 (9th Cir. 1989).
24 Deliberate retaliation by state actors in response to use of legal process is actionable
25 under § 1983 because it may chill an inmate's First Amendment right to petition for
26 redress of grievances. *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir.
27 1989). Conduct used to discourage the exercise of First Amendment freedoms need not
28 be particularly great in order to find that rights have been violated. *Thomas v.*

1 *Carpenter*, 881 F.2d 828, 830 (9th Cir. 1989). For example, rights are infringed both
 2 where the government fines a person a penny for being a Republican and where it
 3 withholds the grant of a penny for the same reason. *Id.* citing *Elrod v. Burns*, 427 U.S.
 4 347, 359 (1976); see also *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997)(stating that the
 5 injury is the retaliatory action's "chilling effect" on First Amendment rights and a "more
 6 substantial injury" is not required to support the retaliation claim).

7 Although it can be difficult to establish the motives or intent of the Defendants,
 8 Plaintiff may rely on circumstantial evidence. *Hines* at 267-68; *Pratt v. Rowland*, 65
 9 F.3d 802 (9th Cir. 1995) ("timing can properly be considered as circumstantial evidence
 10 of retaliatory intent"). In *Pratt*, the court focused on the timing of the alleged
 11 retaliatory actions and "most importantly" on whether there was evidence that
 12 defendants were "actually aware" of plaintiff's First Amendment activities. *Id.* at 808.

13 Even if a plaintiff establishes retaliatory motive, plaintiff also "bears the burden
 14 of pleading and proving the absence of legitimate correctional goals for the conduct of
 15 which he complains." *Id.* at 806; but see *Austin v. Terhune*, 367 F.3d 1167, 1171 n. 3
 16 ("[plaintiff's] **allegations** of retaliation for the filing of grievances are sufficient to
 17 satisfy the requirement that [plaintiff] plead an absence of a legitimate penological
 18 purpose for the retaliatory action") (emphasis added). Additionally, "prison officials
 19 may not defeat a retaliation claim on summary judgment simply by articulating a
 20 general justification for a neutral process, when there is a genuine issue of fact as to
 21 whether the action was taken in retaliation for the exercise of a constitutional right".
 22 *Bruce v. Ylst*, 351 F.3d 1283, 1289 (9th Cir. 2003).

23 Under the first factor in *Rizzo*, it is clear that Mitchell's activities related to
 24 pursuing his grievances in the prison administrative system and in state court enjoy First
 25 Amendment Protection. The second and third factors are not as clear. Mitchell alleges
 26 the confiscation of legal documents and religious items occurred because of, and
 27 infringed upon, his constitutionally protected rights. There is also the question of
 28 whether Defendant's actions, which Mitchell perceived as retaliatory, were reasonably

1 related to legitimate penological interests.

2 **October 2001 Cell Search**

3 The only Defendant involved in this search is Powell. Plaintiff contends that
4 during the cell search Powell learned of Plaintiff's "complaints filed against prison staff
5 and officials" and confiscated legal materials. (Ct. Rec. 23, p. 2). Powell alleged that
6 only one legal document was taken and that it belonged to another inmate. Plaintiff
7 filed a prison grievance and appeals, all of which were denied. In analyzing the timing
8 of the alleged retaliatory action and Powell's awareness of Plaintiff's activities, the court
9 finds that issues of fact remain. Plaintiff has alleged that the retaliatory act
10 (confiscation of legal materials) occurred immediately after Powell learned of his First
11 Amendment activities. An inference can be drawn from the timing and from Powell's
12 alleged awareness of Mitchell's First Amendment activities that the motive was
13 retaliatory. Defendant's motion for summary judgment is **DENIED** as to the retaliation
14 claim based on this search.

15 **February 2003 Cell Search**

16 This search involved Defendants Rundlett and Porter and the hearing and
17 disposition of property involved Defendant Carlsen. This search occurred when
18 Plaintiff's state court action was pending against the State of Washington and Airway
19 Heights Correctional Center's superintendent and chaplain. The search occurred six
20 days after Plaintiff was deposed in that matter. Plaintiff claims that the timing of this
21 search establishes retaliatory motive. Defendants Porter and Rundlett claimed they had
22 no knowledge of Plaintiff's state court litigation at the time of the search in February,
23 2003. (See Ct. Rec. 17, p. 448-464). Plaintiff has offered no evidence that they were
24 aware. The mere fact that state court litigation is pending when a cell search and
25 confiscation of property occurs does not establish retaliatory motive. Defendants
26 Rundlett and Porter are **GRANTED** summary judgment on Plaintiff's retaliation claim
27 as to this search.

28 However, Defendant Carlsen did have knowledge of Plaintiff's pending litigation.

1 Despite this knowledge, and Plaintiff telling Carlsen that several of the items taken were
2 to be used as exhibits in the state law suit, Carlsen ordered the items destroyed, even
3 though Plaintiff refused to sign the property disposition form. The trier of fact could
4 find that Carlsen's actions were retaliatory. Therefore, Carlsen cannot rely for his
5 defense on an assertion that he was complying with a neutral Department of Corrections
6 policy. Defendant Carlsen's motion for summary judgment on this retaliation claim is
7 **DENIED.**

8 **August 2003 Cell Search**

9 The only Defendant involved in this search is Powell. Legal documents were
10 confiscated. At this time, Powell definitely knew of Plaintiff's litigation and prison
11 grievance First Amendment activities as Plaintiff had filed a staff misconduct grievance
12 against Powell following the October 2001 search. However, Plaintiff cannot establish,
13 as a matter of law, the third-prong under *Rizzo* that the alleged retaliatory actions were
14 not reasonably related to legitimate penological interests. Powell seized the documents
15 contending they belonged to another inmate and Plaintiff admitted such and pled guilty
16 to the infraction. Defendant Powell's motion for summary judgment is **GRANTED** as
17 to the retaliation claim based on the August 2003 search.

18 **December 2003 Cell Search**

19 The Defendants involved in this search were Powell and Ward. By this time,
20 Powell was certainly aware of Plaintiff's First Amendment protected activities. Ward
21 declares that he was not aware of grievances against Powell, that the grievance process
22 is confidential, and that the search was not based on Plaintiff's prior filing of grievances.
23 (Ct. Rec. 17, p. 438). Plaintiff does not offer evidence to dispute Ward's unawareness
24 of his prior grievances. Plaintiff also alleges Ward filed a false infraction against him
25 for which he was found not guilty. This infraction was based on possession of thermal
26 clothing and sweatpants that Ward believed Plaintiff was not allowed to have. (Ct. Rec.
27 17, p. 440 & 446). The clothing was not related to Plaintiff's First Amendment
28 activities, Plaintiff was found not guilty of the infraction as the clothes were state issued

1 at a previous institution, and no sanctions were imposed. Defendant Ward is
2 **GRANTED** summary judgment on the retaliation claim related to this cell search.
3 Defendant Powell's request for summary judgment on this claim is **DENIED**, as the
4 trier of fact could find from Powell's prior involvement with the cell searches,
5 knowledge of Plaintiff's First Amendment activities, and Plaintiff's filing of a staff
6 misconduct grievance against her that her motives were retaliatory.

7 **Retaliation claim against Brenda Deshazer**

8 Deshazer's filing of the infraction against Mitchell was clearly because of his
9 First Amendment protected activity of filing Washington state tort claims. What is at
10 issue is whether Deshazer's motive was an honest belief that Mitchell was fraudulently
11 abusing the tort claim system, or retaliation. Deshazer's infraction report states that "the
12 search report shows the disposition of all items confiscated and Mitchell signed that he
13 understood the disposition and did not contest these items". In fact, as to the February,
14 2003 cell search, which was a basis for the tort claims, Mitchell had refused to sign the
15 property disposition form and the form so indicated. The trier of fact could find that the
16 filing of the infraction was not an honest mistake, but was retaliatory. However, upon
17 writing a letter to the Superintendent of Airway Heights, Mitchell was successful in
18 having the infraction and sanction imposed expunged from the record.

19 Deshazer's motion for summary judgment on the retaliation claim is **DENIED**.
20 Although Mitchell's injury is minimal given that the infraction and sanction were
21 expunged, and if Mitchell succeeded on this claim damages would likely be nominal,
22 the court is concerned with the chilling effect on First Amendment activities that being
23 forced to defend retaliatory infraction reports would have.

24 **II. The Free Exercise Claims**

25 In order to establish a violation of the First Amendment right to free exercise of
26 religion, a prisoner must show the defendants burdened the practice of his religion by
27 preventing him from engaging in conduct mandated by his faith, without any
28 justification reasonably related to legitimate penological interests. *Freeman v. Arpaio*,

125 F.3d 732 (9th Cir. 1997). "In order to reach the level of a constitutional violation,
 2 the interference with one's practice of religion must be more than an inconvenience; the
 3 burden must be substantial and an interference with a tenet or belief that is central to
 4 religious doctrine." *Id.* at 737 (internal quotations and citations omitted).

In analyzing the legitimacy of regulation of a prisoner's religious expression, the court utilizes the factors set forth in *Turner v. Safley*, 482 U.S. 78 (1987): 1) whether there is a valid, rational connection between the regulation and the interest used to justify the regulation; 2) whether the prisoners retain alternative means of exercising the right at issue; 3) the impact the requested accommodation will have on inmates, prison staff, and prison resources generally; and 4) whether the prisoner has identified easy alternatives to the regulations which could be implemented at a minimal cost to legitimate penological objectives. The court will apply *Turner* and *Freeman* to each of the allegedly wrongful searches and the actions of the individual Defendants.

October 2001 Cell Search

There is no allegation that Mitchell's First Amendment right to free exercise of religion was infringed by this search.

February 2003 Cell Search

Mitchell contends that the following religious property was wrongfully confiscated by Porter and Rundlett and its destruction authorized by Carlsen: a Quran, Final Call religious periodicals, and the book "Message to the Black Man in America". Mitchell admits that the Final Call newspapers were over one week old and thus his possession of them violated Department of Corrections policy. Summary judgment is **GRANTED** to the three Defendants as to the confiscation and destruction of the Final Call newspapers.

Mitchell does dispute that the Quran had a ripped cover and even the declarations of the searching officers slightly differ. (See Ct. Rec. 17, p. 451 - Porter stating the "cover was ripped"; and Ct. Rec. 17 p. 463 - Rundlett stating the Quran had been altered by "having the cover ripped off"). Mitchell also disputes that his religious text,

1 "Message to the Black Man" was not properly marked with his name and DOC number.
2 Accordingly, genuine issues of material fact exist as to whether these items were seized
3 in accordance with DOC policy. If they were not, then the seizure and subsequent
4 destruction was not justified as reasonably related to legitimate penological interests.
5 Defendants motion for summary judgment on the religious freedom claim concerning
6 the seizure of the Quran and book "Message to the Black Man" in February, 2003, is
7 **DENIED.**

8 **August 2003 Cell Search**

9 There is no allegation that Mitchell's First Amendment right to free exercise of
10 religion was infringed by this search.

11 **December 2003 Cell Search**

12 Mitchell contends that his Bible was seized and destroyed by Defendants Powell
13 and Ward. Mitchell has submitted his declaration and that of other inmates in support
14 of his claim that the Bible was used in group bible studies and discussion, and that the
15 Bible was not altered and was properly marked with Mitchell's name and DOC number.
16 Again, genuine issues of material fact exist as to whether this Bible was seized in
17 accordance with DOC policy. If it was not, then the seizure and subsequent destruction
18 was not justified as reasonably related to legitimate penological interests. Defendants'
19 motion for summary judgment on the religious freedom claim concerning the seizure
20 and subsequent destruction of the Bible during the December 2003 search is **DENIED.**

21 **CONCLUSION**

22 By way of summary, the following claims remain against the following Defendants
23 and shall proceed to trial:

24 1) Defendant Carlsen - retaliation and interference with free exercise of religion
25 claims remain as to the February 2003 cell search and disposition of Quran and
26 religious text "Message to the Black Man".

27 2) Defendant Porter - No retaliation claims survive summary judgment as to
28 Defendant Porter. A free exercise claim remains as to Porter's participation in the cell

1 search of February 2003

2 3) Defendant Powell - retaliation claims remain as to the October 2001 and
3 December 2003 cell searches. A free exercise claim remains as to the December 2003
4 search and destruction of Bible.

5 4) Defendant Rundlett - No retaliation claims survive summary judgment as to
6 Defendant Rundlett. A free exercise claim remains as to Rundlett's participation in the
7 cell search of February 2003.

8 5) Defendant Ward - No retaliation claims survive summary judgment as to
9 Defendant Ward. A free exercise claim remains as to Ward's participation in the cell
10 search of February 2003.

11 6) Defendant DeShazer - There is no free exercise claim against DeShazer. The
12 retaliation claim based on the filing of an infraction report in January 2004 survives
13 summary judgment.

14 No retaliation claims or free exercise claims based on the August 2003 cell search
15 survive summary judgment. Accordingly, all claims related to that search are
16 dismissed.

17 **IT IS HEREBY ORDERED:**

18 1. Defendants' Motion for Summary Judgment (Ct. Rec. 15) is **DENIED IN**
19 **PART and GRANTED IN PART as set forth herein.** Defendant has raised genuine
20 issues of material fact as to some of the claims asserted in his First Amended Complaint
21 (Ct. Rec. 3). Accordingly, this matter shall proceed to trial.

22 2. A telephonic pretrial conference shall be held on **Friday, September 2, 2005,**
23 **at 10:00 a.m..** Counsel for the Defendants shall contact Plaintiff's counselor at Airway
24 Heights and secure a phone number at which Plaintiff can be reached. Defense counsel
25 shall convey this number and the telephone number at which she may be reached ,to the
26 court's judicial assistant, Margaret Buckner, at 509-353-2180 prior to August 30, 2005.

27
28 3. At the telephonic pretrial conference, the court will, *inter alia*, discuss with

1 the Plaintiff and counsel for the Defendants the fact that cases such as these are most
2 often resolved by settlement of the claims, having in mind that even if successful on the
3 claims, the damages to the Plaintiff appear to be nominal. Prior to the pretrial
4 conference, counsel for the Defendants and the Plaintiff shall make good faith efforts to
5 reach a settlement of these claims.

6 4. Trial briefs, requested jury instructions and requested voir dire shall be served
7 and filed to be in the court's hands by **September 23, 2005**.

8 5. A jury trial shall commence in Spokane, Washington at **9:00 a.m. on**
9 **Monday, October 3, 2005.**

10 **IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and
11 furnish copies to counsel.

12 ||| **DATED** this 4th day of August, 2005.

s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE